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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

YUPOONG, INC., a Foreign
 Corporation,

Plaintiff,

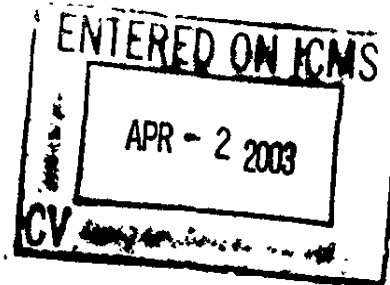
v.

H & C HEADWEAR INC., a
 California Corporation, d/b/a
 KC CAPS,

Defendant.

Case No. CV 03-01098 SVW (JWJx)

ORDER GRANTING PLAINTIFF
 YUPOONG, INC.'S MOTION FOR
 PRELIMINARY INJUNCTION.



I. INTRODUCTION

Plaintiff Yupoong, Inc. ("Plaintiff") manufactures the patented FLEXFIT® baseball cap ("FLEXFIT"), U.S. Patent No. 5,715,540 ("the '540 patent"). Plaintiff seeks a preliminary injunction to prevent Defendant H & C Headwear Inc. ("Defendant") from marketing and selling the allegedly infringing "New Generation NU-FIT™" ("NU-FIT") line of baseball caps. Plaintiff contends that the NU-FIT baseball cap infringes Claim 7 of the '540 patent.

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1 Defendant argues in Opposition that there are serious doubts as
2 to the validity of Plaintiff's patent, and a preliminary injunction
3 therefore would not be proper. Specifically, Defendant argues that
4 the '540 patent is invalid based on prior art that allegedly was not
5 before the Patent and Trademark Office ("PTO"). In addition,
6 Defendant contends that the NU-FIT cap does not infringe Claim 7 of
7 the '540 patent. Lastly, Defendant argues that Plaintiff has not and
8 cannot demonstrate irreparable harm.

9 However, as explained more fully below, Defendant has not made a
10 substantial showing of patent invalidity. Because Plaintiff has
11 presented sufficient evidence that it will likely prove Defendant's
12 NU-FIT cap infringes Claim 7 of the '540 patent, and because
13 Plaintiff has made an adequate showing of irreparable harm, the Court
14 GRANTS Plaintiff's Motion for Preliminary Injunction.

15 16 II. FACTUAL AND PROCEDURAL BACKGROUND

17 Plaintiff Yupoong, Inc., based in Seoul, South Korea, is one of
18 the largest manufacturers of headwear in the world. (Cho Decl. at ¶
19 3.) Since 1998, Plaintiff has manufactured and sold the FLEXFIT line
20 of baseball caps. (Id. at ¶ 4.) The FLEXFIT caps are "free-size"
21 caps, which include a multi-size feature that allows the caps to
22 stretch to fit wearers with varying head sizes. (Id. at ¶ 5.) The
23 FLEXFIT cap has achieved a great amount of success and is Plaintiff's
24 most successful product. (Id. at ¶¶ 4-8.)

25 The patent in suit - the '540 Patent - encompasses Plaintiff's
26 FLEXFIT cap. The sole claim at issue in this Motion, Claim 7,

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1 focuses on alleged improvements in which the lateral and rear gores¹
2 of the cap are composed of "uniaxially stretchable material capable
3 of being stretched along a chordial axis." Claim 7 also covers a
4 sweatband on the interior circumference of the shell, which is also
5 composed of a "uniaxially" stretchable material stretched "only along
6 the chordial axis" of the shell. Because the FLEXFIT cap is woven of
7 spandex yarn only for weft (i.e. the crosswise direction of the loom)
8 and not warp, the lateral and rear gores and the sweatband of the cap
9 stretch only in the "chordial" (i.e. longitudinal or lengthwise)
10 direction.

11 Defendant H & C Headwear Inc., based in California, sells
12 headwear and other apparel products. (Ruseckas Decl. at ¶¶ 4, 8-9.)
13 Headwear represents the majority of Defendant's business.
14 (Declaration of John Lee ("Lee Decl.") at ¶¶ 1, 2.) In fact, 95% of
15 Defendant's 2002 revenue was attributable to headwear. (*Id.*)
16 Defendant first began selling stretchable caps in 1999. (Lee Decl.
17 at ¶ 3.) In January of 2003, Defendant introduced its "New
18 Generation NU-FIT" caps, which have one-piece stretchable sweatbands.
19 (Cho Decl. at ¶ 10; Ruseckas Decl at ¶¶ 5-10; Lee Decl. at ¶¶ 7, 10.)
20 In addition, the NU-FIT caps have lateral and rear gores that, like
21 the stretchable sweatbands, incorporate spandex only in the weft
22 weave of the fabric. (Ruseckas Decl. at ¶¶ 6-7; Lee Decl. at ¶ 8.)

23 Plaintiff filed a Complaint for patent infringement against
24 Defendant on February 14, 2003. On February 24, 2003, Plaintiff
25

26 ¹A gore is a triangular piece of cloth that forms a segment
27 of the shell of the cap. See Webster's Third New International
28 Dictionary 980 (1981). The crown portion of the cap is comprised
of six gores.

1 filed a Motion for Preliminary Injunction, which currently is before
2 the Court.

3 4 **III. ANALYSIS**

5 **A. Legal Standard**

6 The grant or denial of a preliminary injunction pursuant to 35
7 U.S.C. § 283 is within the discretion of the District Court.
8 Amazon.com, Inc. v. Barnesandnoble.com, Inc., 239 F.3d 1343, 1350
9 (Fed. Cir. 2001). Plaintiff is entitled to a preliminary injunction
10 if it can show: "(1) a reasonable likelihood of success on the
11 merits; (2) irreparable harm if an injunction is not granted; (3) a
12 balance of hardships tipping in its favor; and (4) the injunction's
13 favorable impact on the public interest." Id. (citations omitted).
14 "These factors, taken individually, are not dispositive; rather, the
15 district court must weigh and measure each factor against the other
16 factors and against the form and magnitude of the relief requested."
17 Id. (citation and internal quotation marks omitted). Furthermore,
18 Plaintiff must establish the first two factors - reasonable
19 likelihood of success on the merits and irreparable harm - in order
20 for the Court to grant the preliminary injunction. Id.

21 **B. Likelihood of Success on the Merits**

22 Plaintiff must show, in order to demonstrate a reasonable
23 likelihood of success on the merits, that "in light of the
24 presumptions and burdens that will inhere at trial on the merits,"
25 Plaintiff will likely prove that (1) Defendant's NU-FIT cap infringes
26 the '540 patent, and (2) Plaintiff's claim will likely withstand
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1 Defendant's validity challenge. Id. (citing Genentech, Inc. v. Novo
2 Nordisk, A/S, 108 F.3d 1361, 1364 (Fed. Cir. 1997)).

3 If Defendant raises a substantial question regarding either
4 infringement or validity - in other words, "asserts an infringement
5 or invalidity defense that the patentee cannot prove 'lacks
6 substantial merit[]" - the Court should not issue the preliminary
7 injunction. Id. at 1350-51 (citing Genentech, 108 F.3d at 1364).

8 **1. Patent Infringement**

9 Infringement analysis requires the Court to determine the
10 meaning of the claim and then compare the properly construed claim to
11 the accused device. See Amazon.com, 239 F.3d at 1350. "All claims
12 must be construed in light of the specification and the prosecution
13 history." See Grain Processing Corp. v. Amer. Maize-Products Co.,
14 840 F.2d 902, 908 (Fed. Cir. 1988) (citations omitted).

15 **a. Construction of Claim 7**

16 Claim construction is a pure legal question to be determined by
17 the Court. Markman v. Westview Instruments, Inc., 52 F.3d 967 (Fed.
18 Cir. 1995) (en banc), aff'd, 517 U.S. 370, 116 S. Ct. 1384 (1996).
19 In making its determination, the Court should focus on the language
20 of the claim itself. See Bell Communications Research, Inc. v.
21 Vitalink Communications Corp., 55 F.3d 615, 620 (Fed. Cir. 1995). A
22 term is to receive its ordinary meaning unless the patent
23 specification or prosecution history makes it clear that the inventor
24 intended a different meaning or definition. Vitronics Corp. v.
25 Conceptronic, Inc., 90 F.3d 1576, 1582 (Fed. Cir. 1997). There is a
26 "heavy presumption" that the terms in the claim are entitled to their
27
28

1 ordinary meaning. CCS Fitness, Inc. v. Brunswick Corp., 288 F.3d
2 1359, 1366 (Fed. Cir. 2002) (citations omitted).

3 Claim 7 reads as follows:

4 A multi-size cap adapted to accommodate
5 wearers having a range of head sizes and
6 including a multi-gore shell forming a crown
7 portion yet having an appearance of being
8 fitted, a visor portion secured to a forward
9 edge of said shell and extending outwardly
10 therefrom, said multi-gore shell including a
11 pair of front gores fixedly secured to said
visor, and a plurality of lateral and rear
gores, each of said plurality of gores extending
from a common apex point, said front gores being
composed of an unstretchable material which is
sufficiently rigid to be self-supporting; the
improvement comprising;

12 said lateral and rear gores being composed
13 of a uniaxially stretchable material capable of
14 being stretched only along a chordial axis of
15 said multi-gore shell; wherein said uniaxially
16 stretchable fabric is a woven fabric having
spandex yarn woven therein for weft and having
yarn having no elasticity for warp, and wherein
said weft is disposed in a front and rear
direction of said main body; and

17 a sweatband disposed along an interior
18 circumference of said multi-gore shell, and
19 sweatband being composed of a uniaxially
stretchable material capable of being stretched
only along the chordial axis of said multi-gore
shell.

20 As Plaintiff explains, the only term specifically defined by the
21 specification is the "chordial axis," which is defined as follows:
22 "According to the present invention, gores forming a rear portion of
23 the crown are uniaxially stretchable in the peripheral direction
24 (also referred to hereafter as the chordial axis) of the cap
25 structure. In other words, the uniaxial stretch occurs in the
26 direction of the edge band of the cap." ('540 Patent, Col. 4, ll. 1-
27 5.)
28

Furthermore, "warp" is defined in the Webster's Third New International Dictionary² as "a series or sheet of parallel yarns or threads set up for textile processing; [specifically]: a series of yarns extended lengthwise in a loom thereby forming the lengthwise threads of a woven fabric" Webster's Third New International Dictionary 2592 (1981). The dictionary defines "warp" as "the thread or yarn that crosses the warp and extends from selvage to selvage of a cloth[.]"³ Id. at 2577. And, with respect to the '540 Patent, a "gore" is "a tapering or triangular piece of cloth[.]" Id. at 980. The meaning of these terms is undisputed.

b. The NU-FIT Cap Infringes Claim 7 of the '540 Patent

Plaintiff contends that the NU-FIT cap infringes Plaintiff's patent. Like the FLEXFIT cap, the NU-FIT cap is a multi-size stretch baseball cap, which has stretchable lateral and rear gores and a stretchable sweatband. Defendant contends that the NU-FIT cap does not infringe Plaintiff's patent because the lateral and rear gores and the sweatband stretch not only in the "chordial" direction (i.e. in the longitudinal direction), but also diagonally. As Defendant points out, Claim 7 covers caps that stretch only in the longitudinal

²The Court is permitted to use a dictionary as extrinsic evidence to aid in claim construction. See, e.g., CCS Fitness, 288 F.3d at 1366 (citation omitted).

³The Webster's Third New International Dictionary defines "selvage" as follows: "[T]he edge on either side of a woven or flat-knitted fabric so finished as to prevent raveling; [specifically]: a narrow border often woven of difference heavier threads than the fabric and sometimes in a different weave[.]" Webster's Third New International Dictionary 2062.

1 direction. The Claim states in pertinent part: "lateral and rear
2 gores being composed of a uniaxially stretchable material capable of
3 being stretched only along a chordial axis of said multi-gore shell."
4 Because the NU-FIT cap stretches diagonally as well, Defendant
5 contends the cap does not infringe Claim 7 of the '540 patent.

6 However, as Plaintiff points out, the NU-FIT caps are woven in
7 the same manner as the FLEXFIT caps, and any diagonal stretch is due
8 to the fact that the fabric stretches in the longitudinal direction.
9 As explained above, the lateral and rear gores and the sweatband of
10 the NU-FIT caps are made of spandex woven only in the weft direction.
11 (Declaration of Jong Ho Parl ("Park. Decl.") at ¶¶ 3, 5, 6.) Any
12 diagonal stretch in the sweatband and the lateral and rear gores of
13 the NU-FIT caps (and the FLEXFIT caps) cannot be avoided, as it is a
14 natural result of using a woven fabric for the crown and sweatband
15 material. (Park Decl. ¶ 7.)

17 Plaintiff thus argues that "[t]he fact that there is some modest
18 give in other directions, such as diagonal, is not inconsistent with
19 the fabric 'stretching' in only one direction." (Plaintiff's Reply
20 at 7-8.) Because Defendant's construction would exclude Plaintiff's
21 own FLEXFIT cap from being covered by the '540 patent, Plaintiff
22 contends that Defendant's construction of the claim should not be
23 adopted.

24 As the Federal Circuit explains, "it is unlikely that an
25 inventor would define the invention in a way that excluded the
26 preferred embodiment, or that persons of skill in [the relevant]
27 field would read the specification in such a way." Hoechst Celanese
28

1 Corp. v. BP Chems. Ltd., 78 F.3d 1575, 1581 (Fed. Cir. 1996)
2 (citation omitted), cert. denied, 519 U.S. 911 (1996). Furthermore,
3 in Modine Mfg. Co. v. United States Int'l Trade Comm'n, the court
4 explains that "a claim interpretation that would exclude the
5 inventor's device is rarely the correct interpretation[.]" 75 F.3d
6 1545, 1550 (Fed. Cir. 1996), cert. denied, 518 U.S. 1005 (1996).

7 Thus, here, because the diagonal stretch in the NU-FIT and
8 FLEXFIT caps is a natural result of the presence of spandex in the
9 weft (but not the warp) weave, and because excluding diagonal stretch
10 from the claim would exclude Plaintiff's preferred embodiment, the
11 Court does not adopt Defendant's construction. The claim should be
12 construed so as to cover the preferred embodiment of the patent.
13 Because Defendant's NU-FIT cap is manufactured in the same manner as
14 the preferred embodiment of the '540 patent (i.e. the sweatband and
15 the lateral and rear gores of the NU-FIT cap includes spandex woven
16 in the weft direction, but not in the warp direction), based on the
17 record currently before the Court, it appears that Defendant's NU-FIT
18 cap reads on the "well-construed claim."

19
20 Therefore, Plaintiff has made an adequate showing that
21 Defendant's NU-FIT cap will be found to infringe the '540 Patent.

22 **2. Validity of the '540 Patent**

23 While Plaintiff need not establish the validity of the patent
24 beyond question, Plaintiff must present a clear case supporting the
25 validity of the '540 patent. See Amazon.com, 239 F.3d at 1359
26 (citations omitted). A patentee can present a "clear and convincing
27 case" regarding the validity of the patent in suit by showing, for
28

1 example, that the patent has successfully withstood similar
2 challenges to the its validity or that there is "a long period of
3 industry acquiescence in the patent's validity." Id. (citation
4 omitted).

5 Furthermore, "[i]n resisting a preliminary injunction
6 [Defendant] need not make out a case of actual invalidity.
7 Vulnerability is at issue in the preliminary injunction The
8 showing of a substantial question as to invalidity thus requires less
9 proof than the clear and convincing showing necessary to establish
10 invalidity itself." Id. at 1358-59. At this stage, the Court does
11 not resolve the validity question, but rather must make an assessment
12 of the persuasiveness of Defendant's evidence. New England Braiding
13 Co., Inc. v. A.W. Chesterton Co., 970 F.2d 878, 882-83 (Fed. Cir.
14 1992) (footnote omitted). After all, "[g]iven the time constraints
15 within which an accused infringer must usually respond with evidence
16 to a motion for preliminary injunction, . . . a fully comprehensive
17 presentation of [the defendant's] defenses cannot reasonably be
18 required." Id. at 883.

19 Here, Defendant has not made a substantial showing of
20 invalidity. Defendant points out that Claim 7 (which was claim 13 at
21 the time of prosecution) was originally rejected by the PTO as
22 anticipated by the Lipkin '007 prior art patent. The PTO Examiner
23 read the Lipkin '007 patent as having a sweatband in the form of a
24 flap portion that was made from uniaxially stretchable material.
25 After Plaintiff's patent was rejected by the PTO, however, Plaintiff
26
27 ///
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1 appealed to the PTO's Board of Patent Appeals and Interferences ("the
2 Board").

3 The Board upheld the PTO's rejection except in one respect - the
4 Board explained that the Claim was patentable:

5 [A]lthough [the Lipkin '007 patent] calls ear flap portion
6 19 an "elongated band" [citation], within the context of
7 these claims it cannot be regarded as a sweatband, which is
8 defined as "a band lining the bottom of the inside of the
9 crown or hat or cap to protect it against sweat from the
10 head." In our view, one of ordinary skill in the art would
not consider [ear flap portion 19] to be a sweatband, since
it is not a "band" in the sense that a sweatband is, i.e.,
"a thin flat strip," and does not extend around the total
inside circumference of Lipkin's cap.

11 (Declaration of Raymond L. Hollister ("Hollister Decl."), Ex. M at
12 216-17 (footnotes omitted).)

13 The Board further explained that "[i]n view of the lack of
14 disclosure of a sweatband in Lipkin, as discussed above, and the
15 absence of any evidence that the provision thereof would have been
16 obvious, there is no basis in the record to support the rejection of
17 [the claims]." (Id. at 217-18.) Claim 7 was thus patentable because
18 (1) the Lipkin ear flap was not a "sweatband," and (2) there was no
19 prior art before the Board showing that the inclusion of a sweatband
20 in the Lipkin '007 patent would have been obvious.

21
22 Defendant contends that the Board ruled that Claim 7 was
23 patentable only because the PTO was not aware of prior art,
24 specifically the Lipkin '523 patent (U.S. Patent No. 3,247,523),
25 which discloses a hat including an ear flap that is secured to, and
26 extends completely around, the lower edge of the cap. Defendant
27 explains that the band will necessarily absorb any sweat forming on
28

1 the wearer's head and therefore constitutes a sweatband.

2 (Defendant's Opposition at 12.)

3 While Defendant argues that the ear flap in the Lipkin '523
4 patent "goes all the way around" the cap and is therefore a
5 sweatband, Plaintiff points out that the Board specifically held that
6 an ear flap is not a sweatband. While the Board did explain that the
7 Lipkin '007 ear flap did not extend completely around the
8 circumference of the cap, this fact alone was not dispositive.
9 Rather, the Board stated that an ear flap cannot be considered a
10 sweatband, which is "'a band lining the bottom of the inside of the
11 crown or hat or cap to protect it against sweat from the head.'"
12 (Hollister Decl., Ex. M at 217.)

13
14 Plaintiff concedes that the Lipkin '523 patent was not
15 considered by the PTO. (Plaintiff's Further Reply at 1.) However,
16 as Plaintiff explains, the mere fact the Lipkin '523 patent covers an
17 ear flap that extends all the way around the cap does not transform
18 the ear flap into a sweatband. In addition, the PTO and the Board
19 considered the Howe patent, U.S. Patent No. 5,153,939, which is
20 discussed in the specification of the '540 patent. The Howe patent
21 clearly discloses a headband extending completely around the inside
22 of a cap. (See Third Supplemental Declaration of Mark J. Carlozzi
23 ("Carlozzi Decl."), Ex. B.) Because a patent with an earflap
24 extending completely around the circumference of a cap was considered
25 by the PTO, the Lipkin '523 patent is cumulative of other art
26 expressly considered by the PTO and therefore is not the "missing
27 link" rendering Claim 7 obvious.
28

1 Because Defendant's entire validity challenge centers around the
2 Lipkin '523 patent, Defendant has not made a substantial showing of
3 invalidity.

4 **C. Irreparable Harm**

5 In order for the Court to grant a preliminary injunction,
6 Plaintiff must make a showing of irreparable harm. "Irreparable harm
7 is presumed when a clear showing of patent validity and infringement
8 has been made." Amazon.com, 239 F.3d at 1350 (citation omitted).
9 Notwithstanding this presumption, Plaintiff has made a substantial
10 showing of irreparable harm.

11 In Oakley, Inc. v. Sunglass Hut Intl., a case involving
12 infringement of patented sunglass lenses, the court held the
13 following evidence constituted irreparable harm: (1) if the
14 defendants were permitted to continue to sell their blue and green
15 colored sunglass lenses during the pendency of the lawsuit, the
16 defendants would have eroded the plaintiff's exclusivity and goodwill
17 associated with its products; (2) the defendants' infringing products
18 were sold in very close proximity to the plaintiff's patented
19 products; and (3) the defendants intended to release huge numbers of
20 the infringing sunglasses into the marketplace and to wage a large
21 advertising campaign, which would likely have eroded the plaintiff's
22 market presence and its goodwill associated with its patented lens
23 coatings. 61 U.S.P.Q.2d (BNA) 1658, 1668 (C.D. Cal. 2001), aff'd,
24 316 F.3d 1331 (Fed. Cir. 2003).
25

26 Here, as in Oakley, Plaintiff will suffer from price erosion and
27 loss of market share if Defendant's cap is released. Specifically,
28

1 Plaintiff contends that the lower-priced NU-FIT caps threaten to
2 undermine sales of Plaintiff's FLEXFIT caps. (Declaration of Byoung
3 Woo Cho ("Cho Decl.") at ¶¶ 12, 13.) In addition, the fact that
4 Defendant sells and markets its caps at the same trade shows where
5 Plaintiff markets and sells its FLEXFIT caps also supports
6 Plaintiff's position. (See Ruseckas Decl. at ¶¶ 5, 8, 13, 14; Lee
7 Decl. at ¶¶ 11, 12.) Furthermore, "the lesser-quality NU-FIT caps
8 threaten FLEXFIT® brand's strong reputation for high quality, a
9 reputation that is critical to Yupoong's relationship with leading
10 brand-name customers such as Nike®, Reebok®, Adidas®, Quicksilver®,
11 Oakley®, and Billabong®." (Plaintiff's Motion at 16 (citing Cho
12 Decl. at ¶¶ 3, 9; Ruseckas Decl. at ¶¶ 11-14).) If Defendant's caps
13 are allowed to flood the market, the sales of NU-FIT caps will cut
14 into Plaintiff's market share and injure Plaintiff's goodwill. (See
15 Cho Decl. at ¶ 10; Ruseckas Decl. at ¶ 14; Supplemental Declaration
16 of Robert J. Ruseckas ("Supplemental Ruseckas Decl.") at ¶ 12.)

17
18 The Federal Circuit has held similar evidence supports a
19 patentee's claim of irreparable harm. For example, in Bio-Technology
20 Gen. Corp. v. Genentech, Inc. 80 F.3d 1553, 1566 (Fed. Cir. 1996),
21 the court stated that in addition to finding that the patentee was
22 entitled to the presumption of irreparable harm, "the district court
23 determined that [the patentee] would be harmed if [the alleged
24 infringer] were allowed to enter the market because [the patentee]
25 would lose revenues and goodwill" Similarly, in Reebok Intl.
26 v. Baker, Inc., 32 F.3d 1552, 1558 (Fed. Cir. 1994), the court
27 explained: "Harm to reputation resulting from confusion between an
28

1 inferior accused product and a patentee's superior product is a type
2 of harm that is often not fully compensable by money because the
3 damages caused are speculative and difficult to measure."

4 Defendant argues, however, that Plaintiff's alleged delay in
5 bringing this lawsuit weighs against a finding of irreparable harm.⁴
6 The Federal Circuit explains in High Tech Medical Instrumentation,
7 Inc. v. New Image Industries, Inc., that "[a]bsent a good
8 explanation, . . . 17 months is a substantial period of delay that
9 militates against the issuance of a preliminary injunction by
10 demonstrating that there is no apparent urgency to the request for
11 injunctive relief." 49 F.3d 1551, 1557 (Fed. Cir. 1995) (citations
12 omitted). In addition, the district court in Wang Labs. Inc. v.
13 Mitsubishi Elecs. America Inc. held that "[d]elay does not preclude a
14 finding of irreparable harm as a matter of law, [citation], but it is
15 a relevant factor to be considered, [citation], and it may be
16 sufficiently clear evidence to rebut a presumption of irreparable
17 harm, [citations]." 29 U.S.P.Q.2d (BNA) 1481, 1500 (C.D. Cal. 1993).

18
19 Defendant argues that the "New Generation NU-FIT" caps, which
20 are at issue in this case, stretch in the same way as Defendant's
21 Style No. 2001 hat introduced in 2001. Defendant contends that both
22 caps - the Style No. 2001 caps and the New Generation NU-FIT caps -
23

24 ⁴Defendant also explains that Plaintiff's allegations of
25 irreparable harm are essentially allegations related to trademark
26 infringement. Defendant is correct that a patent case turns only
27 on whether the asserted claims literally embrace the accused
28 product. While the alleged harm that relates to trademark
confusion therefore is irrelevant to this analysis, Plaintiff
does allege harm that is traceable to patent infringement, which
is relevant.

1 stretch in the longitudinal and diagonal direction. Because
2 Defendant contends Plaintiff should have sued for infringement in
3 2001 for the Style No. 2001 caps, Defendant argues that the delay
4 precludes a finding of irreparable harm.

5 While Defendant claims that there was a two-year delay in
6 bringing this lawsuit, as Plaintiff points out, the Style No. 2001
7 appears not to infringe the '540 patent. Plaintiff submits the
8 Declaration of Robert J. Ruseckas ("Ruseckas Decl."), which
9 establishes that the sweatband of the Style No. 2001 cap stretches
10 both longitudinally and in an up-and-down direction. (Ruseckas Decl.
11 at ¶ 7; Supplemental Ruseckas Decl. at ¶ 5.) This is also evident
12 upon examination of the Style No. 2001 cap. Because these caps
13 likely do not to infringe the '540 patent,⁵ the presence of the Style
14 No. 2001 caps in the marketplace since 2001 does not establish delay
15 for purposes of this lawsuit, which concerns the New Generation NU-
16 FIT cap.
17

18 Moreover, because Plaintiff only became aware of the NU-FIT cap
19 at the January 2003 Imprinted Sportswear show, Plaintiff did not
20
21

22
23 ⁵Defendant explains that the lateral and rear gores of the
24 Style No. 2001 caps incorporate spandex only into the yarn
25 forming the weft weave of the material of the cap. (See Lee
26 Decl. at ¶ 6.) While the lateral and rear gores do appear to
27 infringe Plaintiff's patent, a key component of the '540 patent
28 is the uniaxially stretchable sweatband, which incorporates
spandex only into the yarn forming the weft weave. Because the
headband of the Style No. 2001 cap (1) does not appear to be a
sweatband, and (2) stretches in an up-and-down direction as well
as longitudinally, the cap does not appear to infringe the '540
patent.

1 delay in bringing this lawsuit. Plaintiff, therefore, has made an
2 adequate showing of irreparable harm.

3 **D. Balance of Hardships⁶**

4 The balance of hardships also favors granting the preliminary
5 injunction in this case. The Court must weigh the threatened injury
6 to the patent holder if injunctive relief is not granted against the
7 injury to the accused infringer if the preliminary injunction is
8 granted. Hybritech, Inc. v. Abbott Labs., 849 F.2d 1446, 1457 (Fed.
9 Cir. 1988) (footnote omitted).

10 Plaintiff explains that because the FLEXFIT caps account for 70%
11 of Yupoong's sales in the United States, (Cho Decl. at ¶ 4), if
12 Yupoong is forced to lower its price to compete with the lower-priced
13 competition, "the losses incurred would irreparably and significantly
14 damage Yupoong's overall financial position." (Plaintiff's Further
15 Reply at 18.) In addition, Plaintiff's goodwill and reputation would
16 be detrimentally affected if the injunction is not issued. (Cho
17 Decl. at ¶¶ 9,10; Ruseckas Decl. at ¶¶ 11, 14.)

18 Plaintiff further contends that any hardship Defendant may
19 suffer if an injunction is issued is less than the harm Plaintiff
20 will suffer if the Court does not issue the injunction. And, as the
21 district court in Amazon.com explained, "[t]he balance of hardships
22 does not favor a defendant where the defendant 'took a calculated
23 risk that it might infringe [the plaintiff's] patents.'" Amazon.com,
24
25

26
27 ⁶It is worth noting that Defendant does not address the
28 balance of hardships or public interest prongs of the preliminary
injunction analysis in opposing Plaintiff's Motion.

1 Inc. v. Barnesandnoble.com, Inc., 73 F. Supp. 2d 1228, 1248 (W.D.
2 Wash. 1999) (citing Smith Int'l, Inc. v. Hughes Tools Co., 718 F.2d
3 1573, 1581 (Fed. Cir. 1983)), vacated on other grounds, 239 F.3d 1343
4 (2001). The court in Oakley similarly explained: "The Court does not
5 doubt that injunction will cause Defendants some hardship. However,
6 the hardship Defendants allege they would suffer is not unlike any
7 other party enjoined from infringing a valid patent." 61 U.S.P.Q.2d
8 at 1668.

9 Here, too, the alleged hardship Defendant may suffer if the
10 injunction is granted would be attributable to the "calculated risk"
11 Defendant took in manufacturing and attempting to sell a product that
12 likely infringes Plaintiff's patent. Therefore, the balance of
13 hardships favors granting the preliminary injunction.
14

15 **E. Public Interest**

16 "In patent cases there is an important public interest in favor
17 of protecting the rights secured by a valid patent." Oakley, 61
18 U.S.P.Q.2d at 1668 (citing Hybritech, 849 F.2d at 1458). However,
19 "[t]ypically, . . . the focus of the district court's public interest
20 analysis should be whether there exists some critical public interest
21 that would be injured by the grant of preliminary relief."
22 Hybritech, 849 F.2d at 1458 (footnotes omitted).

23 For example, in a case involving the alleged infringement of a
24 patent relating to an intra-aortic balloon (IAB) catheter, the court
25 held that "regarding the public interest factor, . . . [the
26 defendant] has [] made some showing that the public will be harmed by
27 an injunction in that some physicians prefer [the] defendant's dual
28

1 lumen IABs." Datascope Corp. v. Kontron, Inc., 786 F.2d 398, 401
2 (Fed. Cir. 1986) (citing Datascope Corp. v. Kontron, Inc., 611 F.
3 Supp. 889, 895 (D. Mass. 1985)).

4 Here, there is no analogous public interest that will be injured
5 if the Court issues the injunction. Defendant does not even attempt
6 to argue that such an interest exists. The public interest therefore
7 favors the grant of the preliminary injunction. As the court in
8 Oakley held, "[b]ecause there is no 'critical public interest' to
9 counterbalance the public interest in protecting rights secured by
10 valid patents, . . . the public interest also favors the grant of the
11 preliminary injunction." 61 U.S.P.Q.2d at 1668.

12 **F. Bond Amount**

13
14 Federal Rule of Civil Procedure 65(c) requires a successful
15 movant for a preliminary injunction to post security "for the payment
16 of such costs and damages as may be incurred or suffered by any party
17 who is found to have been wrongfully enjoined or restrained." Fed.
18 R. Civ. P. 65(c).

19 The Court finds that a \$250,000 bond is appropriate under the
20 circumstances of this case.

21 **IV. CONCLUSION**

22
23 Accordingly, the Court GRANTS Plaintiff Yupoong, Inc.'s Motion
24 for Preliminary Injunction. Pending resolution of the trial of this
25 action, Defendant H & C Headwear Inc., its officers, directors,
26 agents, representatives, distributors, importers, subsidiaries and
27 all other persons or business enterprises in active concert or
28

1 participation with them, who receive actual notice of this Order, are
2 hereby enjoined from manufacturing, using, selling, importing into
3 this country, or offering to sell in the United States the line of
4 free-size, stretchable caps that H & C presently is selling and
5 offering to sell under the name "New Generation NU-FIT."

6 Defendant shall give notice of this Order to any distributors,
7 wholesalers, or resellers located in the United States to whom it has
8 sold or otherwise transferred any "New Generation NU-FIT" caps.

9 Pursuant to Federal Rule of Civil Procedure 65(c), Plaintiff
10 Yupoong, Inc. shall post a security bond in the amount of \$250,000
11 with the Court on or before Monday, April 7, 2003. This injunction
12 shall be effective immediately upon the posting of the required bond.
13 Plaintiff Yupoong, Inc. shall give notice to Defendant in writing
14 when it has posted the required bond.
15

16
17 IT IS SO ORDERED.

18
19 DATED: 4/1/03

20 
21

22 STEPHEN V. WILSON
23 UNITED STATES DISTRICT JUDGE
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